

**Yellow Freight System, Inc. and Otis Cross and George Frazier and Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an Affiliate of the International Brotherhood of Teamsters, AFL-CIO.** Cases 13-CA-31963, 13-CA-32131, 13-CA-32116, and 13-CA-32151

April 28, 1995

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND TRUESDALE

On January 31, 1995, Administrative Law Judge Thomas R. Wilks, issued the attached decision. The Charging Party, George Frazier, filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Yellow Freight System, Inc., Chicago Ridge, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> Charging Party Frazier has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Denise R. Jackson*, for the General Counsel.

*Ronald E. Sandhaus, Esq.*, of Overland Park, Illinois, for the Respondent.

*Thomas Carpenter, Esq.*, of Chicago, Illinois, for the Charging Party Union.

## DECISION

### STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. On September 1, 1993, Otis Cross, an individual, filed the charge in Case 13-CA-31963. Thereafter, on November 9, 1993, George Frazier, an individual, filed the charge in Case 13-CA-32116. On November 12, 1993, Otis Cross filed the charge in Case 13-CA-32131. On November 19, 1993, Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (the Union) filed the charge in Case 13-CA-32151. Each of these four

charges alleged that Yellow Freight Systems (the Respondent) violated the National Labor Relations Act.

On October 25, 1993, the Regional Director for Region 13 of the National Labor Relations Board issued complaint and notice of hearing in Case 13-CA-31963 alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Thereafter, on January 12, 1994, the Regional Director issued an order consolidating cases, amended consolidated complaint, and notice of hearing for Cases 13-CA-31963, 13-CA-32131, 13-CA-32116, and 13-CA-32151. The order alleged that Respondent violated Section 8(a)(1), (3), and (5) of the Act.

More specifically, the complaint alleges that on July 8, 1993, Respondent initiated step one of its progressive disciplinary system with respect to its driver-employees Frazier and Cross, the latter a union steward, because of their union or otherwise protected activities. Those activities were later argued to consist of Cross' excessively vigorous representation of Frazier in a predisciplinary "coaching" or investigatory/counseling session held on July 8, prompted by Frazier's conduct that Respondent perceived to be sexual harassment of a female office employee. The General Counsel does not challenge Respondent's good faith with respect to its judgment that Frazier engaged in sexual harassment and did not litigate the merit of that judgment. The General Counsel's theory is that Respondent would not have proceeded to step one of the disciplinary procedure had it not been for Cross' presence and vigorous representation of Frazier at the coaching session, for which Cross himself received a step-one warning letter for insubordinate conduct.

The complaint further alleges that on October 22, 1993, Respondent discriminatorily terminated a past practice whereby stewards Cross and Thomas Gamino had been given preferential traveling assignments and preferential early starting times in order to accommodate their representation of unit employees at outlying satellite terminals at which there was no steward domiciled. It is alleged that the action was taken because of the concerted activities of "the named employees" in violation of Section 8(a)(1) and (3) of the Act and without giving prior notice to and bargaining opportunity to the Union, thus violating Section 8(a)(1) and (5) of the Act.

The Respondent filed a timely answer wherein it admitted much of the operative facts but denied that the warning letters were unlawfully motivated. It also denied unlawful motivation for the rescission of the past practice of preferential assignment to the two stewards. Subsequently, Respondent took the position that Frazier was issued a warning letter because he chose not to participate meaningfully in an optional predisciplinary coaching session at which Respondent sought to educate him about its antisexual harassment policies. It contends that Cross was issued a warning because of his insubordinate disruptiveness at the coaching session, which conduct lost his protection of the Act. Respondent argues that Cross' conduct at the coaching session ought to be evaluated, not by the criteria of permissiveness extended by Board precedent to stewards engaged in negotiations or in grievance resolution, but rather by the more limited participatory rights of a union steward at an interview held in part to explore an employee's alleged misconduct that depending on that employees' level of cooperation could lead to discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 451

(1975). The Respondent argues that it sought in the coaching session to explore and evaluate Frazier's sensitivity or lack thereof to potential sexual harassment situations and to assure that Frazier understood its policy by reading it to him verbatim. Respondent contends that Cross sought to transform the coaching session into an abusively adversary confrontation, in part over the definition of sexual harassment itself and its manager's authority with respect to sexual harassment issues; and by so doing frustrated Respondent's right to conduct an investigative interview. To a great extent, the General Counsel's own witnesses confirm that Cross did engage in adversarial and confrontational conduct that prohibited Manager Robert Zimmerman from conveying Respondent's sexual harassment policies to Frazier and that led to a de facto rejection of the coaching session, Frazier's presence there notwithstanding.

It is a factual issue whether Zimmerman laid hands on Cross in an effort to eject him at the point the session was aborted and when it appeared Cross was reluctant to leave Zimmerman's office, as requested, or whether Cross pounded Zimmerman's desk and shouted obscenities at him.

Respondent admits to the cessation of a past practice of granting preferential assignments to main terminal stewards in which they could, on company time and with company vehicles, service outgoing satellite terminals. Respondent claims that it was the Union itself that proffered that very cessation in return for the appointment of a steward among those drivers domiciled at the outlying terminals. Respondent further argues that when it quickly agreed to the change and informed the Union of its implementation the Union neither requested bargaining over it nor raised the issue in subsequent collective bargaining over a succeeding contract. Furthermore, Respondent argues that the past preferential assignment to stewards that deviated from the job-bidding seniority rights to which they would otherwise be entitled as non-representational employees "may actually be an illegal superseniority agreement in violation of Section 8(b)(2) of the Act." Respondent cited *Dairylea Cooperative*, 219 NLRB 656 (1975). The General Counsel did not anticipate the *Dairylea* issue and is silent with respect to it.

The complaint also alleges that Respondent, by its Linehaul Manager Mark Van Dyke, "about early October 1993" threatened Cross with unspecified reprisals "for filing charges with the Board" in violation of Section 8(a)(1) of the Act. That issue is resolvable only by a one-to-one credibility resolution between Cross and Van Dyke.

The foregoing issues were litigated before me at trial on September 20, 1994, at Chicago, Illinois, at which all parties were given full opportunity to examine witnesses and to introduce relevant documentary evidence. The parties exercised their option to file briefs that because of their request and my impending absence from my office for the month of October was set for October 25. Pursuant to subsequently granted extensions of time, briefs were not filed until November 14 and 15, 1994.

On the entire record of this case, including my evaluation of witnesses' demeanor, I make the following

## FINDINGS OF FACT

### I. JURISDICTION AND LABOR ORGANIZATION

Based on the admissions and the record, I find that Respondent's business activities meet the required Board jurisdictional criteria and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Facts

##### 1. Background

Respondent is a transcontinental trucking company that operates numerous terminals throughout the United States, including the main hub at Chicago Ridge, Illinois (Harlem Avenue location or CGB). Respondent maintained other outlying satellite area terminals in the periphery of its Chicago service area at Wheeling, Illinois (WEE); Elk Grove, West Chicago; and Palatine, Illinois. Shuttle drivers and pickup and delivery truckdrivers employed at all locations are in a bargaining unit represented by the Union. During 1993 Cross was employed as a shuttle driver domiciled at the CGB location. He also served as steward for the Union. George Frazier was employed as a driver at WEE and was represented by the Union. Gamino, like Cross, was a shuttle driver domiciled at CGB and also a union steward. He and Cross were responsible for the representation of unit employees at the other terminals. They frequently accomplished this by the past practice of Respondent's assignment of them, at their requests, to shuttle runs to the outlying terminals to accommodate their representational duties. Often, this entailed the use of an empty Respondent vehicle. They were also granted a preferential earlier starting time (i.e., earlier than that to which they were entitled under the job assignment and shift starting bid process).

The Union and Respondent were and are parties to a succession of collective-bargaining agreements, one of which was effective from April 1, 1991, to March 31, 1994. The contracts were silent concerning the preferential assignment and its preferential starting time practice for union stewards. There is no evidence that the subject had been discussed at any of the earlier collective-bargaining sessions. There is undisputed testimony that the Union did not raise the subject during negotiations following the expiration of the 1991-1994 agreement.

There is an absence in the record of any persisting Respondent animus toward employees who engage in grievance or any other union or concerted activities. There is no evidence of Respondent aversion to employees who wish representation or counseling by stewards or other unit employee representatives during the coaching sessions. Cross had been employed as a shuttle driver since May 1981 and commenced his steward duties in April 1993. He testified that he had counseled employees in three or four coaching sessions as a union steward and was present at 30 or 40 more coaching sessions as a nonofficial representative. He failed to tes-

tify to any prior animus to any of his past representational activities, official or otherwise.

It is undisputed that Respondent has conducted managerial and supervisory training sessions with respect to implementing an antisexual harassment policy throughout its system to accommodate pertinent Federal civil rights legislation, Supreme Court precedent, and EEOC guidelines. Robert Zimmerman, the WEE branch manager, had participated in Respondent's antisexual harassment training shortly prior to July 7, 1993.

## 2. The coaching session process

The nature of the so-called coaching session procedure was explained by the essentially uncontroverted testimony of Respondent's witnesses. Respondent Corporate Manager of Labor Relations Robert Stultz was responsible for the negotiation of collective-bargaining agreements covering five States, including those covering Respondent's Chicago hub operation with the Union and with its sister Teamsters Local 710, which represented other Respondent employees including loaders and dock workers. Stultz is also responsible for the overall review of all grievances. Stultz set forth the history of the coaching session process. It was initiated by Respondent as a preprogressive discipline mechanism to resolve work problems arising between the employee and Respondent by mutual recognition of the problem, a discussion of it, and a mutually agreed-on resolution. The process was proffered as an alternative to the disciplinary system and acceptance of the process was optional for the employee. It was not considered to be a disciplinary system by either Respondent or the Union according to Stultz and he is not contradicted.

On the initiation of the coaching session process, the Union expressed disinterest and avoided involvement with the process on the grounds that it was not part of a disciplinary process. Local 510, however, enthusiastically embraced it and consistently participated in it. Cross testified that he only participated in three or four coaching sessions during his tenure as a union steward. After an open courtroom colloquy concerning his competence to testify about the consequences of employees' refusal to cooperate in the process by virtue of his limited experience, he thereafter testified that he participated in the process 20 to 30 times, but not as a union representative. Unit employees may freely select other unit employees to accompany and assist them when they participated in coaching sessions. Cross' experience was primarily that of a coworker. Twenty or thirty unexplained incidents raise some question about the reliability of his testimony, however, particularly because it appeared to be geared to resolve the objection raised to his competency.

During a coaching session the supervisor utilizes a preprinted form containing headings preceding blank specifics to be filled in. The headings are: entitled problem, employee view of causes, supervisor's view of causes, employee's view of solution, supervisor's view of solution, agreed-on solution, solution start date, employee signature, and supervisor signature. Samples submitted into evidence cover a variety of minor problems such as inadvertent commission of shipping errors or omissions of required job functions. WEE Branch Manager Zimmerman testified that in 1993 he presided over 20 to 24 coaching sessions at the WEE terminal. He did not specify what percentage covered Respondent's unit employees. By virtue of Cross' testimony,

despite the Union's initial reluctance, at least some of its employees opted for the coaching session process and he, as a union steward or otherwise, participated.

## 3. Consequences of employee rejection of the coaching session option or noncooperation

The General Counsel argues that had it not been for Cross' participation in the Frazier's counseling session Frazier would not have been issued a warning letter because it must be found that it was not Respondent's practice to do so in other similar situations.

Stultz testified that it was the Respondent's past practice to either issue a warning letter or, in a minor matter, either a letter of information or simply take no action when employees had refused to cooperate with a coaching session. Stultz explained that Respondent's action depended on the employee's proffered reason for noncooperation. A limited sampling of warning letters issued after noncooperation with coaching sessions was introduced into evidence. They involved Local 710 employees, however.

Cross testified, as noted above, after the objection to his competency with respect to limited experience, that he had sat in on 20 to 30 coaching sessions. He then answered, "no" to the General Counsel's question of whether to the best of his knowledge it had been Respondent's practice to issue warning letters to employees who had "refused to sign" the coaching session form. He further testified, without foundation for his knowledge, that if the employees refused the form was merely placed in the employee's personnel file and referred to again if the same problem arose again, at which point the employee would receive a warning letter. Because the vast preponderance of Cross' participation was limited to the role of a fellow unit member, there appears to be no basis for his knowledge about whether or not subsequent warning letters issued or what kind of action took place in the personnel office. Cross gave no names, dates, circumstances, or other details. He did not even specify how often or how infrequent a refusal to "sign" a coaching session form occurred and whether it occurred during any of the three of four incidents when he acted as a steward.

Counsel for General Counsel, who had subpoenaed pertinent Respondent records, proffered into evidence five coaching session incident forms as evidence to support her contention. She adduced no other evidence. There is no evidence about whether or not the employees, whose signatures are absent from the document, were or were not issued warning letters. Stultz had no specific recollection one way or the other. Each party argues that it was the other party's burden to produce such evidence.

The five unsigned coaching session reports adduced into evidence by the General Counsel by themselves prove nothing. They appear to refer to rather minor incidents of employee misfeasance or nonfeasance. Four of them explicitly state that the employee refused to sign the form. Four of them affirmatively reflect an agreed-on solution and a solution starting time. The fifth does not have an entry for the agreed-on solution category but does contain a date for the solution start date (i.e., "today"). Thus these documents reflect at least some degree of employee cooperation with the process despite the failure to actually sign the form. The General Counsel seems to take the position, however, that Frazier was issued a warning letter for the ostensible but

pretextual reason that he refused to sign the coaching session form after he had presented himself for coaching and, by his mere presence itself, effectuated compliance with it. The Respondent takes the position that cooperation and participation in the process were not forthcoming from Frazier despite his presence and he was issued the warning proffered to him as an alternative to meaningful cooperation and not merely because he did not execute the form.

#### 4. Frazier's coaching sessions and adverse consequences

Frazier engaged in certain conduct at the WEE terminal on the morning of July 7, 1993, which was observed by Zimmerman and judged by him to constitute an instance of sexual harassment or at least conduct conducive of creating a hostile environment. The incident consisted of a certain verbal interaction between Frazier, who was in the drivers' room with 15 or more other drivers, and a female office employee, Donna Loss, who was in the dispatch office with several office employees. The verbal exchange occurred through an open window separating the two rooms. It was observed by Zimmerman who was in the drivers' area. He heard the entire exchange. There is a conflict in testimony about what initiated Frazier's comments and, to a minor extent, precisely what Frazier said to Loss.

#### B. *Credibility Findings*

The General Counsel adduced the testimony of Frazier and fellow unit member Jerry Blitstein to what occurred on July 7 and 8, and Cross concerning the confrontation on July 8. Zimmerman testified about the events of July 7 and 8 and was corroborated by Walter Cooper, who at that time held the position of Respondent's operations manager at WEE. When he testified at trial Cooper had been employed elsewhere and under circumstances that would not bias his testimony toward Respondent. He did provide the Board with an affidavit on January 17, 1994, presumably favorable to Respondent. Thus it could be argued that he would be influenced to give testimony not in conflict with prior sworn testimony. Despite that arguable bias I find that he was the least interested witness in the proceeding. The General Counsel's contention with respect to his affidavit testimony consists of misinterpretation of that affidavit testimony in part and mischaracterization of his record testimony and is therefore not persuasive. I find no serious inconsistencies therein.

I find more credible the testimony of Respondent's witnesses with respect to the events of July 7 and 8. The General Counsel's witnesses were in part mutually inconsistent and in part not mutually corroborated. Cross, Frazier, and Blitstein were not as spontaneous as Respondent's witness. They gave the impression of being calculating and indirect, if not evasive, in demeanor despite the fact that they were emotionally at ease in the courtroom setting and, to a great extent, Frazier and Cross were aggressive and at times hostile in cross-examination.

Despite Blitstein's presence with Frazier on July 7 in the drivers' room within hearing range of the verbal interchange with Loss, he was not called on by the General Counsel to corroborate Cross about that interchange. Rather, in cross-examination, he attributed to Frazier certain comments that Frazier had attributed to Loss. Whereas Cross emphasized a

more passive conduct on July 8, Blitstein testified that he felt it necessary to physically restrain Cross in his confrontation with Zimmerman. Blitstein was a very cryptic and conclusionary witness. He was silent with respect to many details testified to by Zimmerman. Neither he nor Frazier denied that Frazier forcefully kicked open Zimmerman's office door for entry on July 7 after being summoned there after the Donna Loss interchange. Other details testified to by Zimmerman were not contradicted.

When asked by the General Counsel whether Frazier refused to participate in the attempted coaching session of July 7, Blitstein, as did Frazier, responded with an answer that was more evasively argumentative than direct (i.e., "It is not a question if he could refuse, he was already in there . . .") replied Blitstein and "No, I was in the room. [Therefore] I did participate").

With respect to the conflict in the testimony about whether Zimmerman was the abusive aggressor both verbally (with Frazier and Cross) and physically (with Cross), it is extremely difficult to visualize Zimmerman in that role. Not only was he less physically imposing than Frazier or Cross, but his demeanor was that of a naturally reticent, soft-spoken, mild-mannered personality. Both Frazier, the biggest and most burly of the three, and Cross came forth as witnesses possessing demeanor of tough, outspoken, hard as nails, give no quarter partisans.

Blitstein admitted that he stayed behind with Zimmerman on July 7 after Frazier departed from an aborted coaching session at which he had also been present. As characteristic of all his testimony his recollection was admittedly poor and selective. Blitstein recalled that Zimmerman was angry and very upset and that tried to smooth things over but that is all he recalled. He did not rebut subsequent detailed testimony of Zimmerman that supported Zimmerman's characterization of the course of the meeting and characterization of Frazier as the verbally aggressive participant who unhesitatingly faced down a smaller and recessive superior in such a manner that Blitstein expressed to Zimmerman fear for Frazier's dismissal.

In view of the foregoing samples of credibility problems of the General Counsel's witnesses, the relative demeanor of all the witnesses, the more specific, detailed, coherent, corroborated testimony of Respondent's witnesses who testified in a more convincing, spontaneous manner, and the record as a whole, I credit the Respondent's witnesses about the events of July 7 and 8, 1993, and, accordingly, find as follows.

#### 1. The July 7 episode

Loss entered the dispatch office seeking information about the departure time of a certain load in order to satisfy a customer inquiry. She eventually directed her inquiry to Frazier via the open window. Frazier answered by inviting her to step out into the open drivers' area where he and the other drivers could "check you out." The invitation aroused laughter from some of the 15 drivers present. Apparently, it was known that she had undergone some body weight loss according to Cooper's admission. Zimmerman heard this and, fresh from a seminar on the subject, considered the comment to be sexual harassment. A coaching session was arranged later in the day, at which Blitstein was freely permitted to be present and assist Frazier after Frazier had forcefully and loudly kicked open Zimmerman's office door. Zimmerman

admonished Frazier for banging open the door and proceeded to recount Frazier's remark to Loss. Zimmerman characterized those remarks as "inappropriate." Frazier responded by accusing Zimmerman of "inappropriate" conduct, by refusing to acknowledge that he had made the remarks to Loss, by saying that he would not acknowledge the coaching session, by saying that he would not even acknowledge Zimmerman, and by asking permission to go the clinic because he claimed he was injured, which he defined as being "hyped up." Zimmerman attempted to convince Frazier to acknowledge the coaching session without success and ordered him back to work. Blitstein tried to calm down Frazier as well as Zimmerman, who had become angry. He stayed behind and asked Zimmerman not to discharge Frazier because he had two children and his "mouth was bigger than his brain." Zimmerman replied that he would not discharge Frazier but that sexual harassment would not be tolerated and comments like those to Loss were not permissible. Blitstein admitted that he overheard the comments and told Zimmerman that he agreed that they were inappropriate.

Zimmerman had never encountered a sexual harassment incident prior to July 7. He therefore contacted his superior, Regional Manager Frank Gentry, and Human Resource Manager Joyce Jansak. The three of them decided that it was important that Frazier be made aware of and acknowledge Respondent's policy with respect to sexual harassment and therefore attempt to do so in another coaching session at which his attitude could be explored and corrected. Thus Frazier was given another chance to avoid a disciplinary action for conduct that Zimmerman, in good faith, considered serious sexual harassment. The General Counsel in effect concedes that Frazier was in jeopardy prior to any concerted protected activity involving Cross by virtue of the concession concerning Zimmerman's good-faith motivation. Even Blitstein's cryptic testimony corroborates Zimmerman to the effect that Frazier refused to acknowledge to Zimmerman that there was even a potential sexual harassment problem because Frazier argued, in effect, that no one had taken offense to his remarks.

## 2. July 8 confrontation

On July 8 Cross happened to be present at WEE in the morning. According to him it was Zimmerman who requested Cross' presence at a second coaching session with Frazier. In the face of that invitation, it is difficult to premise a preexisting animosity toward a union steward's mere presence at that coaching session. Also present at Zimmerman's invitation was Cooper.

Zimmerman started the meeting by asking the participants to conduct themselves in an orderly manner and to keep their voices down and that it was his intention to discuss Respondent's sexual harassment policy and to have Frazier participate in a coaching session. Zimmerman stated that if Frazier did not choose to participate he would be issued a first-step written warning letter. Cross responded that the Union did not recognize coaching sessions, but when Zimmerman asked him whether he wanted to proceed directly to a warning letter, Frazier responded that he did not. Thus, prior to any further conduct by Cross, Respondent's predisposition to proceed to a warning letter in the absence of coaching session participation was made manifest.

The next step in the July 8 coaching session was that Zimmerman proceeded to read verbatim a printed document entitled, *Sexual Harassment*, which had been previously prepared by Respondent and distributed to its managers. The one full page document set forth in five paragraphs Respondent's antisexual harassment policy and set forth therein brief definitions and/or examples of unlawful sexual harassment (e.g., offensive verbal conduct and unwelcome sexual language). It is undisputed by all accounts that Cross persistently interrupted Zimmerman. The interruption included the protestation that the employee, Loss, did not complain about Frazier's remarks. That contention caused a heated argument over the merits of whether or not a sexual offensive remark occurred and whether or not it was appropriate for Zimmerman to initiate the coaching session in the absence of an explicit employee complaint. Cross continued with his interruptions by accusing Zimmerman of having a personal vendetta against Frazier and by shouting at Zimmerman and telling him that he was acting like a "dock cop" whereas his sole function in reality was to move freight (i.e., he had no authority to get involved in sexual harassment prevention). Frazier testified that Zimmerman became "highly agitated" when Cross told him that he was "supposed to be the manager and not a policeman and not to be chasing after somebody's remarks which are false to begin with." According to Frazier, Cross further admonished Zimmerman by telling him that it was not his job "to be policing all the individuals at the terminals over what they say to each other, especially when it is not the kind of remarks that are made to hurt anyone's feelings." Zimmerman responded by asserting that it was indeed within his managerial prerogative to enforce the Respondent's sexual harassment policy, that it is irrelevant whether Loss actually complained, and that he himself witnessed the incident. According to Cross, he persisted in questioning Zimmerman about the factual context of the incident despite Zimmerman's admonishment that Cross was "out of order." Cross persisted in presenting arguments to the effect that Frazier's remarks to Loss were not inappropriate and that the coaching session was "out of line."

Zimmerman attempted to turn the discussion to Frazier and solicited from him some form of solution or agreement concerning his future conduct. Frazier gave no affirmative response but, instead, asked Cross what to do. Cross told him to write on the bottom of the coaching session form that "it is all a lie." Frazier then entered in the space thereon for his signature: "This is a lie." Thereupon, Zimmerman told Frazier that he would be receiving a warning letter for his comments to Loss. Frazier did not respond. Cross jumped up, pounded Zimmerman's desk, and shouted to him that he was a "mother fucking liar." Zimmerman then terminated the meeting and ordered Cross to call his supervisor for his next work assignment and to leave the WEE terminal. Cross did not move but rather shouted in response that Zimmerman was not his boss and could not tell him what to do and that he would talk to Stultz about it. While Cross continued to shout obscenities Zimmerman opened the office door. Cross then walked into the hallway, hesitated, and remained standing. Zimmerman placed his hand on Cross' elbow in an attempt to remove him from the facility by guiding him out. Cross shouted, "Did you see him touch me?" According to the credited testimony of Cooper and Zimmerman, Cross was not pushed or shoved, as he later claimed, but merely guided

or nudged out. Zimmerman threw his hands in the air and walked away. Cross departed from the terminal.

### 3. July 8 reprimand

At the end of the day on July 8 Frazier received a first-step warning letter for making an "inappropriate sexual remark" to the office employee. The letter set forth therein an assertion that Frazier had refused to "participate" in the coaching session, thus "leaving [Zimmerman] with no alternative" but to issue a warning letter. The General Counsel adduced some conclusionary testimony, on which there was no foundation, in an attempt to show that the quick issuance and manner of delivery of the letter were somehow unusual. That testimony was of no probative value.

### 4. July 9 interview and reprimand

On July 9 at 11 a.m., Cross was summoned to the office of CGB Linehaul Operations Manager Mark Van Dyke where, in Dyke's presence, he was interviewed by Stultz who sat at Van Dyke's desk. Cross' account of the interview is conclusionary and selective. According to him, he responded to Stultz' inquiry and gave his account of the July 8 coaching session and was told he would receive a written warning letter for insubordination for "pounding and swearing" at Zimmerman despite his denial for so doing. Stultz asked and Van Dyke responded that Cross had no prior disciplinary problems. Cross testified that in response to his question Stultz said there would be no action taken against Zimmerman for allegedly assaulting Cross in the hallway. Cross was then presented with the warning letter for insubordination (i.e., during the course of the July 8 coaching session in front of Frazier and Cooper, angrily pounding the desk with his fist and shouting obscenities at Zimmerman, after which he was asked to leave the terminal).

Stultz' account of the episode is far more detailed. Those details were not subsequently rebutted by Cross nor otherwise effectively contradicted. Stultz' demeanor was far more dispassionate, spontaneous, and convincing than Cross. I credit Stultz, whom Van Dyke corroborated, and conclude that the following conversation occurred. Stultz had received reports about the door kicking episode of July 7 and the aborted coaching session of that day and Zimmerman's attempt to pursue the matter with Frazier to assure that Frazier understood Respondent's sexual harassment policy. Stultz had received reports about the July 8 coaching session inclusive of Cross' conduct set forth above. Stultz and Cross engaged in a protracted discussion about whether Cross or his own wife would or would not find similar remarks about his wife to be offensive. Thereafter, Cross initially denied the use of foul language. But then, 2 minutes later, Cross pounded his fist on Van Dyke's desk and said,

[A]ll right, all right I got up, I pounded my fist, not at Zimmerman and I said "mother fucker" I don't believe this shit.

Stultz then pointed out to Cross how he had just contradicted himself. Cross responded that the Union would not acknowledge Respondent's position on sexual harassment and the meeting ended with Stultz' statement that Cross would receive a warning letter. Stultz testified that despite his ex-

tensive past dealings with union stewards, he had not encountered an incident of such a "violent manner."

Stultz testified that Cross was issued the warning letter because of his denial and self-contradiction by acting out the very misconduct of which he was accused, conduct that Respondent could not tolerate. He further testified without contradiction that any driver at the WEE terminal was subject to the orders of the terminal manager and was not free to reject his authority unless the order involves his own safety.

On July 26, 1993, Cross served on the Respondent a "rebuttal" memorandum wherein he again denied shouting obscenities and desk pounding. He also stated therein, "I was not asked to leave the terminal." On the face of it, that statement was inconsistent with his testimony but, in cross-examination, he tried to explain it away, claiming that he was "screamed at" to leave and not "asked." In turn Cross alleged verbal and physical abuse by Zimmerman. On July 13, 1993, Cross filed a grievance against Zimmerman wherein he alleged verbal and physical abuse at the July 8 coaching session at which Cross also untruthfully alleged that they had been given no opportunity to respond.

On September 1, 1993, Cross filed the first unfair labor practice charge in this case relative to the warning letters. Frazier did not file his charge until November 9. On November 12 Cross filed another unfair labor practice charge wherein it was alleged that on October 27, the date also of his grievance resubmission, he had been threatened by Respondent for filing unfair labor practice charges against it.

In cross-examination Cross persisted with further strained explanations for inconsistencies in his statements and documents authored by him, which further eroded his credibility. He explained that at the July 8 session he was merely trying to get Zimmerman to "investigate the charges further and if necessary for me to investigate those charges," and, while so doing, he and Zimmerman spoke an equal length of time. Zimmerman had witnessed the entire incident and had nothing further to investigate except Cross' own subjective feelings that he explained to Cross were irrelevant. But, in any event, Cross explained that both he and Zimmerman had consumed equal talking time during the coaching session. When asked to reconcile that testimony with the grievance allegation that Frazier and Cross were given no chance to respond, Cross dissembled by explaining that there was no chance to respond "after Zimmerman decided to take complete control of the meeting with his verbal antics and his abuse to me and Mr. Frazier." I find no credible evidence in the record of verbal abuse of Frazier who chose to say very little at the meeting.

### 5. Van Dyke's threat to Cross

With respect to the alleged threat by Van Dyke Cross testified that it occurred in early October as alleged in the complaint. In cross-examination he was confronted with the date of October 27 set forth in the charge he had filed. He then testified,

I'm saying it was in October. I can't pinpoint the specific date. I don't have that right in my memory right now. . . . sorry.

We can assume that my conversation with Mr. Van Dyke, that it happened in early October.

With respect to his grievance, Cross gave further confusing testimony about the dates of its resubmission. He further testified that warning letters were not grievable despite the undisputed fact that they are considered to be discipline and the fact that he himself filed such a grievance.

With respect to the substance of the alleged threat, Cross testified that he was called to Van Dyke's office and, while they were alone and after Cross was seated, Van Dyke started waving his hands and extended them toward Cross stating,

I want you to forget about the Wheeling thing. It is not going to do you any good, don't pursue that issue, you are going to lose it.

Cross testified,

I asked Mr. Van Dyke, I said to him, "Does this mean that I could hurt myself here at Yellow." And he told me I could take it either way I wanted. He told me that his superiors were fully aware of our conversation. I didn't say no more. I got up and left.

Cross also testified that on numerous occasions, unlike past practice, Van Dyke asked him the purpose for his visit to the WEE terminal. In his testimony, Cross speculated about Van Dyke's motivation (i.e., he presumed it was relative to whether Cross was "lining up some type of support" for his "charges" against Zimmerman). The General Counsel argues that Van Dyke, "in cross examination," did not deny that the conversation occurred and that Van Dyke did not deny the threat of reprisal but Respondent relied instead on testimony that Van Dyke was absent from the terminal on October 27.

Q. At any time [after the issuance of Cross' last warning letter] to the present day did you ever have a conversation or any other meeting about Otis Cross where the Wheeling incident came up?

A. No.

This testimony came on the heels of testimony concerning the July 9 Stultz interview. Thereafter, Van Dyke denied questioning Cross about the purpose of his visits to WEE because, he explained, Cross was expected to go wherever his assignments took him, including WEE, which were easily disclosed by looking at the dispatch records. Van Dyke ignored the fact that Cross, as a roving steward, may have had other nondisclosed union business at the WEE terminal prior to October 22, 1993. Despite the implication in the brief by counsel for General Counsel, Van Dyke was not cross-examined by her about the alleged threat conversation.

Thus the record contains the testimony of Cross, whose credibility is shown to be vulnerable in other areas, but whose testimony on this incident was clear, concise, precise, self-contained, and accompanied by conviction and uncharacteristic spontaneity. The so-called denial by Van Dyke was elicited by a somewhat ambiguous question. He was asked about a meeting and/or conversation "about Cross," not with Cross. He was asked about such a meeting or conversations "where the Wheeling incident came up." That question is too vague and generalized in form and thus precludes me from construing Van Dyke's monosyllabic answer as a clear

categorical denial and unambiguous contradiction to Cross. Furthermore, on this point, Van Dyke lacked certainty and conviction in demeanor. Despite Cross' unreliability in other areas I conclude that with respect to the confrontation with Van Dyke he was the more credible witness.

#### *C. Alleged Unilateral Cessation of Preferential Shuttle Trip and Starting Assignments to Stewards*

Respondent admits that as of October 22, 1993, it rescinded the longstanding past practice of giving preference to stewards Cross and Gamino with respect to satellite terminal shuttle trip destinations and starting times. It argues that the changed practice was prompted by conversations initiated by the Union and in consequence thereof.

Van Dyke testified that he effectuated the cessation of preferential assignments to Cross and Gamino pursuant to verbal instructions from Stultz who told him that effective October 22, the past practice ceased, that the Elk Grove terminal had now a designated domiciled steward and that each satellite terminal would similarly have its own domiciled steward.<sup>1</sup> On October 22, 1993, Van Dyke instructed, by memoranda, all dispatchers to cease honoring special requests by Cross to visit the satellites or to have early starts and that all union business would henceforth be handled by the union business agent or the domiciled stewards. Gamino worked in pickup and deliver and was not directly under Van Dyke's jurisdiction.

Gamino testified, pursuant to leading examination, that "yes," he did attend a meeting at Nicklebees' restaurant about October 22, 1993. He testified that present were Stultz and Union Business Agent Gene Bock. Gamino testified that at the meeting Stultz told him that he would no longer receive preferential assignments for union business. Gamino failed to testify in direct examination about anything else stated at that meeting. Bock's duties up to that time had been to negotiate and police the compliance of collective-bargaining agreements and to resolve problems arising thereunder. Bock's testimony was inconsistent with that of Gamino. According to Bock, Gamino complained of being denied preferential union business assignments even before the Nicklebees' meeting, at which Gamino testified that he was given first notice of such. Bock testified that it was in consequence of Gamino's complaint that the meeting was held at Nicklebees on that same day in late September. Bock testified that at the meeting at which other business was also discussed he asked Stultz if Respondent had changed its policy toward preferential assignments for servicing the satellite terminals and that Stultz responded that it "wasn't company policy, it was a policy by 705 by the letter directed to him by Mr. Zero," (i.e., Bock testified that he believed that is what Stultz said). In essence, he explained, Stultz claimed that Zero had changed the policy. The only letter adduced into evidence from Zero was the September 16 notification of the appointment of a domiciled steward at Elk Grove. It is unclear from Bock's testimony whether Stultz had reference to it or to some other document. Bock testified that

<sup>1</sup> Respondent was notified by the Union by letter signed by Assistant Trustee Gerald Zero and dated September 16, 1993, that Tom J. Schneider had been appointed steward at Elk Grove terminal that had recently merged with the Melrose terminal.

the meeting lasted about an hour but gave no further account of it.

Bock testified that prior to this meeting in August 1993 Union International Representative Jim Buck instructed him to conduct a survey of various trucking companies to ascertain whether there was a consensus among unit members about having domiciled stewards at each terminal. Buck told him that he wanted to appoint domiciled stewards at all outlying terminals instead of having roving stewards servicing them out of CGB. Thereafter, for the next several weeks, Bock traveled to each terminal to discuss the issue with the unit employees. He testified that he "probably" talked to the managers and informed them of his intent. He testified that thereafter no domiciled stewards were appointed at any terminal, except for Tom Schneider at Elk Grove because of unusual problems there related to the merger of that terminal with the Melrose terminal, which he explained required daily representation.

In cross-examination Bock admitted that in their conversation Stultz told him that Respondent's cessation of preferential steward assignments was based on Stultz' "interpretation" of the Union's position to appoint domiciled stewards and, accordingly, Cross and Gamino's service at outlying areas was therefore no longer needed. Further, Bock admitted that he told Stultz in response that there would be further communications about whether CGB stewards would continue to service the satellite terminals. His testimony on this point is oblique. He thought that there had been some sort of "preliminary hearing" on the subject but he was unaware of what transpired thereafter because he ceased serving as the service agent for Respondent and was replaced by another unidentified business agent who did not testify.

In redirect examination Bock then recalled that he told Stultz that it was not "necessarily true" that the Union had decided on a change in policy (i.e., it was still seeking a consensus of unit members). He had no knowledge about whether or not the Union thereafter made some overt attempt to appoint a steward at WEE because he was not involved with the appointment process.

Stultz testified about having had a meeting alone with Bock that preceded the meeting with him and Gamino together. Stultz' credibility regarding that meeting is critical and it was essential that he be contradicted with forceful, convincing, clear, and certain testimony by Bock. Such testimony was not forthcoming from Bock, who hesitantly testified in rebuttal direct examination as follows,

Q. Do you recall having a conversation with Mr. Stultz about the placement of stewards at Yellow Freight facilities?

A. I don't recall. Prior to the meeting that we had at Nicklebee's, I don't recall if I had discussed that with him prior to that or the day I called him. I can't answer, I just can't recall.

Thereafter, he was unable to recall whether he told Stultz that stewards would be "placed" at all terminals nor a conversation wherein Bock stated that the only terminal that would not need a steward was that at Palatine, Illinois.

The General Counsel adduced the testimony of no other witnesses on behalf of the preferential steward assignment issue. Bock's account of the Nicklebees' meeting was not

corroborated by Gamino from whom the General Counsel elicited merely a terse conclusion regarding its outcome. In view of Bock's uncertainty, as expressed in his testimony as well as his demeanor, his failure to testify with specificity, his failure to categorically contradict Stultz, his lack of corroboration, and his incompetence to testify about events after he ceased servicing the bargaining unit, I must credit the more certain and detailed testimony of Stultz. Accordingly, I find that the following interaction between Respondent and the Union occurred in relation to the cessation of the union steward preferential assignment practices.

Stultz received reports from the manager of the Elk Grove and WEE terminals informing him that Bock had conducted meetings concerning the possibility of the appointment or election of stewards at each satellite terminal. Thereafter, Bock spoke with Stultz. In that conversation, Bock told Stultz that he did not want to continue the practice of using CGB traveling stewards. Rather, the Union decided that a lack of adequate representation was prevalent in the industry except for UPS and RPS where there was a substantially lower ratio of stewards to union members. Bock then told Stultz that the Union would place a domiciled union steward at Elk Grove and West Chicago terminals. He said, however, that there was no need to place one at the smaller Palatine, Illinois terminal because Bock, who lived in nearby Crystal Lake, would service it personally. Stultz responded that the change was "fine." Stultz immediately called the appropriate managers and notified them of the cessation of preferential steward assignments for CGB stewards because of the Union's change to domiciled stewards.

Stultz had met subsequently with Bock and Gamino at which was discussed other business relating job bidding. The subject of preferential steward assignments was not raised. Stultz heard nothing further from Bock on that issue.

In November 1993 Union Representative Benny Leonardo contacted Stultz and asked whether Respondent would agree to give Cross preferential union business assignments to WEE. Gamino's status was not raised by Leonardo. Stultz responded that Cross himself was not the issue but rather the Union had asked the Respondent to cease the preferential union steward assignments and it had done so. Stultz advised Leonardo to talk to his unit members at the satellite terminals who would tell him of their disenchantment with the Union's lack of domiciled representation. Stultz told Leonardo that the cessation of the past preferential assignment practice was fine with Respondent and that it wanted it to remain so. Stultz told Leonardo that the Union was free to name as many stewards as it desired in the satellite facilities. Leonardo responded, "Well, we will think about it." Leonardo contacted Stultz twice thereafter and asked if the Company had changed its position. He was told that it had not. No grievance was ever filed over the issue.

Negotiations commenced for a succeeding collective-bargaining agreement on December 22, 1993. An agreement was reached in May. At no time was the issue of preferential traveling assignments to stewards raised during those negotiations although there were modifications made regarding stewards. The contract remained silent on the issue of stewards' right to travel from one satellite to another in the representation of unit employees there. The grievance filed by Cross with respect to his warning letter was discussed with the Union and denied by Respondent and went no further.



During all these interactions at no time did the Union request an opportunity to discuss and bargain over Respondent's decision to abide by the agreement to cease preferential travel assignment to union stewards it had reached with Bock.

#### D. Analysis

##### 1. Threat of reprisal—8(a)(1) violations

During Cross' confrontation with Van Dyke, Cross was told that pursuance of his complaints about Zimmerman would not do him any good. When Cross demanded to know whether it would adversely affect his employment situation, Van Dyke, by answering that Cross could take any implication he wanted out of the remark, logically implied that retaliation was probable. At the time Cross's complaint was entwined with his then-pending unfair labor practice charge. I conclude that Van Dyke, in effect, thus threatened Cross with unspecified retaliation. At the very least, I conclude that Van Dyke's response was calculated to be logically interpreted by Cross as a statement to him that he had incurred an unspecified job status vulnerability because of having engaged in protected activities, including the filing of an unfair labor practice charge.

The General Counsel, citing *United Parcel Service*, 301 NLRB 1142, 1150 (1991), argues that such conduct violated Section 8(a)(1) of the Act. I agree and I so find that by such conduct Respondent violated Section 8(a)(1) of the Act.

##### 2. Warning letters—alleged 8(a)(1) violations

###### a. Frazier's warning letter

The General Counsel recognizes that she has the burden of making a "prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," and that only thereafter does the "burden shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

There is no dispute that Frazier's recourse to the assistance of steward Cross in the counseling session of July 8 was protected activity. The facts fail to disclose Respondent's animosity toward union assistance to an employee in coaching sessions. The Union's sister local freely participated in them. The Union tended to avoid them although Cross himself had participated in several. There is no evidence of past animosity toward Cross' participation in coaching sessions or grievance procedures. The only basis to support an inference of animosity toward Frazier or Cross himself is Zimmerman's dislike of the manner of Cross' participation in the July 8 session.

The factual findings foreclose any inference that Cross' behavior even partially motivated the issuance of a warning letter to Frazier. If it had it would have constituted unlawful motivation. As cited by the General Counsel the Board will not withhold protection from employees who seek the assistance of a union representative in an investigative interview that may lead to discipline because of the unprotected conduct of the union representative during that interview. *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1977) (dealing with employees' and union representative rights in such

interviews as defined by *NLRB v. J. Weingarten, Inc.*, 420 U.S. 451 (1975)).

The facts herein disclose that Frazier chose not to participate meaningfully in a coaching session and was given a warning letter because he chose not to avail himself of the alternative to the first-step discipline. Because of the serious nature of sexual harassment issues, the need to avoid a sexually hostile environment, and the implications of potential punitive liability, the Respondent understandably viewed seriously the situation that Zimmerman had directly witnessed. The Respondent clearly wanted to ascertain whether Frazier understood its policy and to educate him about its sexual harassment policy. It felt that such purpose warranted a second attempt at coaching and Frazier was notified at the outset, prior to any overt behavior by Cross, that he was given a choice—participate or receive a warning letter. Frazier chose to reject the coaching process, not merely by refusing to sign the form but by manifesting a total nonreceptivity to any counseling on the subject of sexual harassment on both July 7 and 8.

I conclude that the issuance of a warning letter to Frazier was not shown to be even partially motivated by Respondent's animosity toward Cross' behavior but, that even if such existed, Respondent proved that Frazier would have received the warning letter regardless of Cross' conduct on July 8. The General Counsel failed to adduce probative, credible evidence of a disparity of treatment to Frazier and failed to produce credible evidence to contradict Respondent testimony about its past practice with respect to issuance of warning letters on rejection of employee participation in coaching sessions. Accordingly, I find the complaint allegations relating to Frazier to be without merit.

###### b. Cross' warning letter

The General Counsel relies on certain Board precedent wherein the Board set forth a wide tolerance for exuberant, discourteous conduct or rude language by union representatives engaged in during grievance or other collective-bargaining negotiations (e.g., *Severance Tool Industries*, 301 NLRB 1166 (1991); and *Syn-Tech Windows Systems*, 294 NLRB 791 (1989)). The Respondent recognizes that precedent but argues that Cross was not engaged in grievance processing nor in negotiations, nor in representing an employee in the disciplinary process. The Respondent argues that the standard by which Cross' behavior should be judged is the more restrictive one applied to a union representative in a *Weingarten* situation. The General Counsel, although citing *New Jersey Bell*, ignored the distinction discussed therein by the Board, *supra* at 279. There, the Board agreed with the judge's observation that the "permissible extent of participation of [*Weingarten*] representatives in interviews is seen to lie somewhere between mandatory silence and adversarial confronting," citing *Postal Service*, 288 NLRB 864, 867 (1988). The Board held that a "careful balance" must be struck "between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by the union representative."

In *New Jersey Bell*, above, the Board concluded that pursuant to the Supreme Court's intention it is the role of the union representative to provide assistance and counsel to the employee being interrogated, but that his presence ought not "transfer the interview into an adversary context or a collec-

tive-bargaining confrontation and that the exercise of the *Weingarten* right must not interfere with the legitimate employer prerogatives.” The Board concluded that the union representative need not be a “passive observer,” but rather he was free to “counsel the employees,” but could not “obstruct the employer in exercising the legitimate prerogative of investigating employee misconduct.” In the *New Jersey Bell* case, the Board found that the union representative therein forfeited his right to remain on the employer’s premises as the employee representative and was therefore lawfully ordered out and, on refusal, lawfully caused to be arrested and charged with trespass. The conduct of the union representative in that case amounted to advising the employee to answer questions only once and to prevent questioning by the employer by that representative’s persistent objections and interruptions.

Both Union and Respondent agreed that a coaching session is not equivalent to the issuance of discipline. Furthermore, it consists of an interview during which the employee’s attitude is probed and, as argued by Respondent, it can lead to discipline depending on the cooperation of the employee or lack thereof in the process. In this case Zimmerman had witnessed the incident and, therefore, he did not have to investigate the incident nor interrogate Frazier to ascertain what had been said. From that aspect the July 8 interview arguably deviated from the typical *Weingarten* situation. Zimmerman’s objective was to avoid discipline by probing Frazier’s attitude, sensitivity, and receptivity to understanding Respondent’s sexual harassment policy and to effectuate such understanding. From that perspective the interview was in part investigatory. The second objective was informational (i.e., to convey Respondent’s policy to him). The final aspect would have been to ascertain whether Frazier comprehended that policy (i.e., in a sense also an investigatory process).

I conclude that the July 8 interview was essentially a *Weingarten* type interview wherein Respondent was entitled to the managerial prerogatives of such interview. Moreover, I conclude that even if the July 8 interview did not strictly constitute a *Weingarten* type interview it was sufficiently akin to it that the same rationale regarding managerial prerogative ought to comply. I conclude that Respondent had the prerogative to inquire and probe into Frazier’s sensitivity to the issue of sexual harassment and his receptivity to comprehension of Respondent’s policy and to educate meaningfully about such (whether or not Respondent was actually correct concerning the legal definition of sexual harassment). I further conclude that Cross was not entitled to disrupt the process by verbally abusive and arrogantly insulting interruptions, by conduct that grossly demeaned Zimmerman’s managerial status in front of an employee and fellow manager and that consisted of violent desk pounding and shouted obscenities, and finally by point-blank falsely calling Zimmerman a liar and thereby refusing to immediately leave the office. Cross was not entitled to convert the coaching session into an adversarial confrontation nor into a negotiation of an understanding of what constitutes sexual harassment. By so doing, and by doing it in the manner described above, I find

that he lost the protection of the Act.<sup>2</sup> Accordingly, I find the allegation of the complaint relating to his warning letter to Cross to be without merit.

#### E. Elimination of Preferential Steward Assignments— Alleged 8(a)(1), (3), and (5) Violations

The General Counsel relies on *Postal Service*, 263 NLRB 357 (1982). That is a case when union stewards were restricted in their ability to process grievances by the unilateral rescission of a past practice of promptly releasing them from work duties to handle grievances. The Board therein dismissed the complaint, however, because the charge was short-lived and past practice reinstated. The General Counsel argues that an 8(a)(5) violation must be found herein because the change was not temporary. The General Counsel is silent in the brief about the issue of discriminatory motivation. The evidence failed to disclose any animus toward Gamino or to grievance activity at the outlying terminals. Presumably, the complaint is premised on the theory that Respondent, in part, rescinded its past practice because it became so enraged with Cross that it changed its entire policy of preferential traveling assignment to CGB stewards just to keep him restricted to the main terminal. The foregoing factual findings preclude findings of either 8(a)(3) or (5) violations. The factual findings fully support Respondent’s contention that the change was not unilateral nor was the Union denied notice and bargaining opportunity. Rather, the credited facts disclose that it was the Union that initiated and requested the change, in order to place domiciled stewards at the satellite terminals and terminate traveling stewards, and that the Respondent immediately agreed to and implemented the new policy. Even Bock admitted that Respondent interpreted the Union’s plan for domiciled satellite stewards to necessarily mean a cessation of traveling stewards and thus the need for preferential steward assignment. Thus, even if Bock were credited, which he is not, Respondent notified the Union of its intention to implement the no-preferential assignment policy as a rational consequence of its interpretation, and Bock’s response was that the Union would subsequently negotiate the issue that to his knowledge it never sought to do so. Arguably, the Union under Bock’s admission, by subsequent interaction, waived the right to bargain over the cessation of preferential steward assignments.<sup>3</sup> It is not necessary to resolve the issue of waiver, however, in view of my findings that the Respondent acted on an agreement reached between Stultz and Bock to which Bock did not thereafter object. Leonardo’s efforts to later obtain preferential assignments for Cross and the apparent failure of the Union to follow through and actually appoint satellite stewards does not detract from the fact that the agreement had been reached. Had the Union changed its mind, however, it never requested Respondent to thereafter renegotiate the matter. Leonardo’s last comment to Stultz was that the Union would “think it over.” Under these facts I find that the allegations of the complaint relating to the cessation of preferential shuttle assignments and shift start assignments to stewards to be without merit. I further

<sup>2</sup> Furthermore, I find the egregiousness of Cross’ conduct far in excess of that kind of rudeness and “salty language” tolerated by the Board in the precedent cited by the General Counsel above.

<sup>3</sup> Compare *Lapeer Foundry & Machine*, 289 NLRB 952 (1988).

find it unnecessary to discuss the defense that such practice had been unlawful under *Dairylea Cooperative*, supra.

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices only to the extent found in the above analysis section of this decision, which unfair labor practices affect commerce within the meaning of the Act.

#### THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, Yellow Freight System, Inc., Chicago Ridge, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening any of its employees with unspecified reprisals for filing charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

<sup>4</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at all its Chicago, Illinois area terminals located at Chicago Ridge, Wheeling, Elk Grove, West Chicago, and Palatine, Illinois, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

All allegations in the complaint not found violative of the Act in this decision are dismissed.

<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten any of our employees with unspecified reprisals for filing charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them under Section 7 of the Act.

YELLOW FREIGHT SYSTEM, INC.